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No. 86-751

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS BEST CORPORATION
AND SUBSIDIARIES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. THE COMMISSIONER'S ATTEMPT TO OVERTURN *CORN PRODUCTS* AND ITS PROGENY IGNORES THE CONGRESSIONAL PURPOSE UNDERLYING 26 U.S.C. § 1221 AND, IF ACCEPTED, WOULD UNDERMINE OVER FIFTY YEARS OF RELIANCE UPON THAT PURPOSE

The Commissioner of Internal Revenue (the "Commissioner") asks this Court to ignore over fifty years of history, during which this Court, the lower courts, the Internal Revenue Service (the "Service") and Congress have consistently recognized the breadth of what is today known as the *Corn Products* doctrine. This doctrine provides that an asset acquired and held for a dominant business purpose is treated

as an ordinary asset, notwithstanding the literal language of the capital asset definition. Despite this history, the Commissioner now suggests that Congress never intended that stock purchased for a dominant business purpose be treated as an ordinary asset. In doing so, the Commissioner necessarily contends that every branch of the federal government — this Court, the lower Courts (except the Eighth Circuit Court of Appeals (the "Eighth Circuit")), the Service and Congress itself — consistently has misinterpreted not only this Court's decision in *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955) ("*Corn Products*"), but 26 U.S.C. § 1221[1] as well.

A. The Commissioner has Failed to Demonstrate that Congress Intended, or Intends, that Section 1221 be Interpreted Literally

Contrary to the Commissioner's argument, *see* Brief of Respondent on Writ of Certiorari at 18, *Arkansas Best Corporation and Subsidiaries v. Commissioner* (No. 86-751) ("Resp. Br."), Congress never intended to grant capital asset treatment to every category of asset not specified in one of the exclusions in § 1221. Neither the legislative history nor the express terms of § 1221 support the Commissioner's position.

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[1] Unless otherwise noted, Section references are to the Internal Revenue Code of 1954, as amended, except for references to "Section 117," which are references to the Internal Revenue Code of 1939, as amended.

1. The Legislative History of Section 1221 Establishes that Congress Intended to Distinguish between Investment Assets and Assets Acquired and Held for a Dominant Business Purpose

When Congress enacted § 206(a)(6) of the Revenue Act of 1921,[2] it distinguished for the first time between property "acquired and held by the taxpayer for profit and investment" and other property. Congress accorded a different treatment to property "acquired and held . . . for profit and investment" in order "to relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions." *Corn Products*, 350 U.S. at 51 (quoting *Burnet v. Harmel*, 287 U.S. 103, 106 (1932)). Although Congress deleted the qualitative "acquired and held . . . for profit and investment" language in 1924,[3] this Court noted subsequently that the 1921 provision had been "reenacted in 1924 without material change." *Burnet v. Harmel*, 287 U.S. 103, 106 (1932). The original intent of Congress, to provide special tax treatment for assets "acquired and held . . . for profit and investment," remained.

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[2] Section 206(a)(6), the original predecessor of § 117(a) of the Internal Revenue Code of 1939 and § 1221 of the Internal Revenue Code of 1954, provided as follows:

> The term "capital assets" as used in this section means *property acquired and held by the taxpayer for profit and investment for more than two years* (whether or not connected with his trade or business), but does not include property held for his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the end of the taxable year.

Revenue Act of 1921, ch. 136, § 206(a)(6), 42 Stat. 233 (1921) (emphasis added).

[3] *See* Revenue Act of 1924, ch. 234, § 208(a), 43 Stat. 253 (1924).

Consistently with that congressional purpose, both this Court[4] and the Treasury Department[5] (the "Treasury") have specifically recognized the determinative role of the tax-

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[4] *See Corn Products.*

[5] G.C.M. 17322, XV-2 C.B. 151 (1936) provided that since "hedging transactions are essentially to be regarded as insurance rather than a dealing in capital assets," gains and losses therefrom should be treated as ordinary business gains and losses. XV-2 C.B. at 155. The Treasury did not suggest that "hedges" fit within the literal language of a statutory exclusion, but instead looked at the business purpose for them.

Following this Court's adoption in *Corn Products*, 350 U.S. at 53, of the rationale of G.C.M. 17322 (at the Commissioner's insistence), the Service has applied the *Corn Products* doctrine in a variety of other situations as well. *See, e.g.*, Rev. Rul. 78-396, 1978-2 C.B. 114 (currency exchange produces ordinary loss where no investment intent for acquisition of currency); Rev. Rul. 78-94, 1978-1 C.B. 58 (sale of stock can give rise to ordinary income or loss if no substantial investment purpose for acquisition of stock; revoking Rev. Rul. 75-13); Rev. Rul. 75-13, 1975-1 C.B. 67 (sale of stock gives rise to ordinary income or loss if predominant purpose for acquiring asset is business-related); Rev. Rul. 72-238, 1972-1 C.B. 65 (gain realized by bank in foreclosure proceeding is ordinary income); Rev. Rul. 70-64, 1970-1 C.B. 36 (redemption of allocation notice provided by agricultural cooperative treated as ordinary income because member joined cooperative to facilitate its business); Rev. Rul. 58-40, 1958-1 C.B. 275 (stock purchased solely for purpose of securing inventory is an ordinary asset). In fact, the Service recognized that its arguments before this Court contradict its administrative position when, on September 29, 1987, in response to the granting of certiorari in this case, it suspended published revenue rulings that rely upon or apply the *Corn Products* doctrine. I.R.S. Notice 87-68, 1987-41 I.R.B. 1.

In addition, the Treasury specifically has noted in its own regulations that stock *can* be other than a capital asset. *See* Treas. Reg. §§ 1.907(c)-1(d)(1), (3) (stock may be classified as an "asset used in a trade or business" for purposes of § 907 only if not a

payer's purpose in classifying assets as capital or ordinary. All of the lower courts that have faced the issue (prior to the Eighth Circuit's unprecedented decision here) have followed suit.[6] No court ever held that Congress intended that the capital asset provision be interpreted literally in all circumstances.

In the face of this long-standing administrative practice under, and judicial interpretation of, the capital asset provision, Congress has not indicated any disagreement with the *Corn Products* doctrine, despite amending § 1221 three times since this Court rendered its decision in *Corn Products*.[7] This Court has stressed time and time again that congressional inaction in the face of consistent, long-standing administrative and judicial interpretations "bespeaks congressional approval." *Corn Products*, 350 U.S. at 53.[8] In fact, this Court found in *Corn Products*, at the Commissioner's insistence, that

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capital asset; regulation contemplates that stock acquired to ensure adequate inventory supply can be a non-capital asset).

[6] *See, e.g., Becker Warburg Paribas Group Inc. v. United States*, 514 F. Supp. 1273, 1280 (N.D. Ill. 1981) (seat on stock exchange held to facilitate floor trading was treated as ordinary asset); *see also* cases cited in Brief of Petitioner on Writ of Certiorari at 8 nn.5-6, *Arkansas Best Corporation and Subsidiaries v. Commissioner* (No. 86-751) ("Pet. Br.").

[7] *See* amendments cited in Brief of Petitioner on Petition for Writ of Certiorari at 3 n.1, *Arkansas Best Corporation and Subsidiaries v. Commissioner* (No. 86-751).

[8] *See also Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938); *Burnet v. Harmel*, 287 U.S. at 108. *Cf.* Rev. Rul. 75-533, 1975-2 C.B. 359, 360-61 (citing *Corn Products* as support for the proposition that the consistent administrative interpretation of Treas. Reg. § 20.2055-1 took on the "force of law" when Congress failed to amend the statute despite the long-standing interpretation thereof).

the business purpose principle established by G.C.M. 17322, XV-2 C.B. 151 (1936), was too entrenched to be changed. 350 U.S. at 53. Over thirty years later, it is the Commissioner who asks for change.

The Commissioner now suggests that "congressional silence" is not a reliable guide to congressional intent. *See* Resp. Br. at 24 n.16. But this Court need not rely upon congressional silence alone to conclude that Congress has sanctioned the *Corn Products* doctrine.[9] That conclusion also is compelled by express congressional consideration and ultimate rejection of the position asserted by the Commissioner in this case. *Cf. Commissioner v. Brown*, 380 U.S. 563, 578 (1965) (significant that Congress had considered, but rejected, a legislative response to a tax result criticized by the Treasury).

The 94th Congress specifically addressed the very question before this Court and declined to adopt a Treasury recommendation that all securities (except securities acquired by dealers and bonds acquired by banks) be considered capital assets. *See* Joint Committee on Internal Revenue Taxation, 94th Cong., 1st Sess., *Description of Technical and Minor Bills*

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[9] It is significant that Congress has not hesitated to act when it has disagreed with the courts' analysis of the capital asset provisions. *See, e.g., Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247 (1941) (fire insurance proceeds treated as ordinary income; legislatively overturned by addition of the predecessor of § 1231(a)(3)(A)(ii)); *Watson v. Commissioner*, 197 F.2d 56 (9th Cir. 1952), *aff'd*, 345 U.S. 544 (1953) (gain attributed to unharvested crop treated as ordinary income; legislatively overturned by addition of the predecessor of § 1231(b)(4)); *Fairbanks v. United States*, 95 F.2d 794 (9th Cir. 1938), *aff'd*, 306 U.S. 436 (1939) (payment and discharge of bond not a sale or exchange; legislatively overturned by addition of the predecessor of § 1271(a)(1)). Yet Congress has never suggested that it disagrees with the *Corn Products* doctrine.

Listed for a Hearing by the Committee on Ways and Means on December 10, 1975 (December 9, 1975). The committees of both houses of Congress reviewed the current law, noting the continuing viability of the *Corn Products* doctrine.[10] Neither found the change proposed by the Treasury desirable.[11]

Congress repeatedly has sanctioned the *Corn Products* doctrine by reenacting § 1221 without material change, despite the universally accepted interpretation of that statute. Accordingly, it is not for the judiciary to change the long-established interpretation of § 1221. If change is desirable — and the Treasury's failure to persuade Congress to make such a change in 1975 casts doubt on that proposition — it should come from Congress.

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[10] *See* H.R. Rep. No. 1360, 94th Cong., 2d Sess. 3 (1976); S. Rep. No. 1392, 94th Cong., 2d Sess. 2-3 (1976). That both houses of Congress are clearly aware of the *Corn Products* doctrine and its implications was made obvious as recently as 1985 and 1986, when committees of each house noted:

> [H]owever, under *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955), property that satisfies the literal language of section 1221 of the [Internal Revenue] Code is not considered a capital asset if the property is used by the taxpayer as an integral part of a trade or business.

H.R. Rep. No. 426, 99th Cong., lst Sess. 450 n.19 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 434 n.5 (1986).

[11] Although Arkansas Best's statement on page 38 of its opening brief that the Senate never approved the version of H.R. 10902, 94th Cong., 2d Sess. (1976) passed by the House of Representatives is technically correct, Arkansas Best wishes to note that the Senate did pass a slightly amended version of H.R. 10902, 122 Cong. Rec. 34,589, 34,664 (1976). Both bills would have required taxpayers to "mark" all securities not purchased as investments, and thus rejected the Treasury's proposal. Neither bill went to conference.

2. The Express Terms of Section 1221 do not Negate the Intent of Congress to Differentiate between Investment Assets and Business Assets

Contrary to the Commissioner's suggestion, *see* Resp. Br. at 18, the *Corn Products* doctrine does not render the express language of § 1221 irrelevant.[12] The Commissioner argues that if assets acquired and retained for a dominant business purpose are treated as ordinary assets, then the parenthetical contained in § 1221 — "(whether or not connected with his trade or business)" — is meaningless. The parenthetical, however, does not address the proper characterization of a particular asset, but states only that mere connection of an

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[12] The Commissioner also suggests that the *Corn Products* doctrine makes the five exclusions in § 1221 superfluous. *See* Resp. Br. at 21. But § 1221 must be evaluated in light of the entire Internal Revenue Code. *See, e.g., Burnet v. Harmel*, 287 U.S. 103 (bonus payments paid pursuant to oil and gas lease were ordinary income even though lease treated as transfer of real property interests under state law); *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260 (1958) (payment for transfer of rights to oil and gas payments was ordinary income even though such rights were property under state law). Like the "business purpose" and "continuity of interest" concepts in tax-free reorganizations, the *Corn Products* doctrine exists as a concept separate and distinct from the exclusions in § 1221. When an asset has been acquired and held for a dominant business purpose, the asset is an ordinary asset and the exclusions in § 1221 are not implicated.

Nor does the *Corn Products* doctrine render § 165(g)(3) superfluous. *See* Resp. Br. at 24 n.15. Section 165(g)(3) provides a safe harbor for parent corporations which own more than 80 percent of their subsidiaries. In the event that the stock of the subsidiary becomes worthless, such stock is accorded ordinary loss treatment under § 165(g)(3). Contrary to the Government's suggestion, *see* Resp. Br. at 24 n.15, § 165(g)(3) says nothing about the stock of a less than 80-percent owned subsidiary. Such stock must be analyzed under the *Corn Products* doctrine.

asset to a trade or business is not determinative of its status as capital or ordinary. Simply put, the statute recognizes that businesses can, and do, own capital assets connected with such businesses. *See, e.g., Crow v. Commissioner*, 79 T.C. 541 (1982) (discussion of "business capital assets").

But assets acquired by a taxpayer for a dominant business purpose are not, and were never intended to be, granted capital asset treatment under § 1221. As the Commissioner argued in his brief in *Corn Products*:

> Congress has made it as clear as the limitations of language permit (short of a detailed enumeration of every conceivable kind of transaction which might be found in every conceivable type of business) that profits and losses derived from the normal operation of a business are not to receive the special tax considerations reserved for what, generally, may be described as investments. The purpose is to protect "investment property" as distinguished from "stock in trade," or property bought and sold for a profit.

Brief of United States on Writ of Certiorari at 27-28, *Corn Products Refining Co. v. United States*, 350 U.S. 46 (1955) (No. 20). The parenthetical does not support the Commissioner's position that all securities must be treated as a capital asset, but rather refutes the existence of any flat or mechanical rule. The statute instead requires that the purposes for acquiring and holding a particular asset, even if connected to a trade or business, be analyzed when determining whether or not it is a capital asset.[13]

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[13] *See also* Brief of Commissioner on Petition for Writ of Certiorari at 17, *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260 (1958) (No. 921):

> [A]s the *Corn Products* case demonstrates, a transaction may fit the literal language of the statute and yet not qualify for capital

Moreover, this Court always has sought to interpret the revenue laws to ensure that congressional purpose will be achieved.[14] Literal application of § 1221 would provide preferential tax treatment to taxpayers in numerous circumstances not contemplated by Congress. It was this concern which this Court stressed in *Corn Products*:

> [T]he capital-asset provision of § [1221] must not be so broadly applied as to defeat rather than further the purpose of Congress . . . Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § [1221] applies to transactions in property which are not the normal source of business income. It was intended to "relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions." . . . Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose.

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gain treatment where it does not fall within the obvious purpose of Congress and where a taxpayer would otherwise be able . . . "to transmute ordinary income into capital gain at will."

[14] *See, e.g.*, cases cited in Pet. Br. at 32 n.18. Similarly, the Service has acknowledged that the revenue laws should be interpreted in a non-literal fashion where necessary to effectuate congressional intent. *See* Rev. Rul. 79-404, 1979-2 C.B. 382 (citing *Corn Products*).

350 U.S. at 52. This Court will do no harm to the statute by implementing its very purpose.

B. Consistently with Congressional Purpose, this Court has Interpreted Section 1221 in a Non-Literal Fashion

This Court has confronted in numerous instances the broad definitional approach adopted by Congress in § 1221. In each instance, this Court has eschewed a literal interpretation where necessary to effectuate congressional intent. In *Burnet v. Harmel*, this Court determined that a lump-sum bonus payment to a lessor under an oil and gas lease was to be treated as ordinary income, even though there was a transfer of "property" to the lessee under state law.[15] 287 U.S. at 112. Seeing no reason to distinguish bonus payments from royalties, which extend over the life of the lease, *id.* at 112, this Court concluded that taxation of such payments as ordinary income did not produce "the kind of hardship aimed at by the capital gains provision of the taxing act." *Id.* at 106. Similarly, in *Hort v. Commissioner*, 313 U.S. 28 (1941), this Court ruled that a lump-sum payment for cancellation of a lease that had nine years to run was ordinary income to the lessor. Because the amount received was essentially a substitute for ordinary rental income, this Court ruled the payment must be regarded as ordinary income even though the leases constituted "property" which failed to come within an exclusion in § 117. *Id.* at 31. In both *Burnet v. Harmel* and *Hort*, the purpose of the statute prevailed, and a literal interpretation

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[15] *See also Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260 (1958) (lump-sum payment for transfer of rights to oil and gas payments was ordinary income even though under state law the transferred oil and gas payments were "property").

thereof, like that now advocated by the Commissioner, was rejected.

This Court later ruled in *Corn Products* that the taxpayer's sale of corn futures[16] produced ordinary income even though corn futures did not fall within the literal language of the exclusions of § 117(a). 350 U.S. at 53. Since the *Corn Products* decision, this Court has continued to construe the capital asset definition narrowly, and in a manner directly inconsistent with the Commissioner's current position. In *Commissioner v. Gillette Motor Transport*, 364 U.S. 130 (1960), this Court ruled that compensation received by the taxpayer for a temporary taking of its facilities during World War II was ordinary income, stating:

> While a capital asset is defined in § 117(a)(1) as "property held by the taxpayer," it is evident that not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset.

Id. at 134. Again, the congressional policy underlying § 1221 prevailed over a contradictory, literal interpretation of the statute.

Despite this Court's holdings to the contrary, the Commissioner now suggests that a literal approach to the statute is required. The Commissioner contends that this Court in *Corn*

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[16] The Commissioner attempts unsuccessfully to distinguish "corn futures" from stock acquired for the purpose of securing adequate inventory supply. *See* Resp. Br. at 38 n.23. Both corn futures and stock are intangible assets, providing rights to other assets. Neither are, in any sense, inventory, but both may be purchased for the business purpose of ensuring an adequate inventory supply. It is this business purpose which mandates ordinary asset treatment under § 1221.

Products did not create a judicial exception to § 117(a) in recognition of congressional purpose, but merely "interpreted" the literal terms of the inventory exclusions under § 117(a). *See* Resp. Br. at 30.[17] The Commissioner's current contentions flatly contradict the arguments which he presented to this Court in *Corn Products*,[18] as well as this Court's analysis in that case. No amount of "re-interpretation" by the Commissioner of this Court's decision can alter the simple truth that this Court has never insisted that § 1221 be applied literally in all cases, and that the Commissioner's position in this case is utterly without precedent or congressional sanction.

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[17] This reading contradicts the Service's understanding of that decision in Rev. Rul. 82-204, 1982-2 C.B. 192, in which the Service acknowledged that *Corn Products* created an extra-statutory exception to § 1221. *See also* Rev. Rul. 79-404, 1979-2 C.B. 382 (nonliteral interpretation of § 1221 necessary to effectuate congressional intent); Treasury Regulations and Revenue Rulings cited *supra* note 5.

[18] The relevant Question Presented in *Corn Products*, as stated by the Commissioner, was as follows:

> Whether the Court of Appeals was correct in affirming the holding of the Tax Court that purchases and sales by taxpayer of corn futures on commodity exchanges were consummated in order to obtain protection for its manufacturing business and were comparable to hedges, and hence that such transactions resulted in ordinary, rather than capital, gains and losses within the purview of the Internal Code of 1939.

Brief of United States on Petition for Writ of Certiorari at 2, *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955) (No. 20). Thus, the Commissioner clearly asked this Court to consider the purpose for which the hedges were purchased, not whether such futures were in some sense "inventory."

C. The Lower Courts Consistently have Held that it is the Purpose for which an Asset is Acquired and Held that Determines Whether an Asset is a Capital or an Ordinary Asset

The Commissioner argues that Congress could not have sanctioned the *Corn Products* doctrine because no definable *Corn Products* doctrine exists. *See* Resp. Br. at 36.[19] This argument mischaracterizes the debate in the lower courts. That debate does not question the validity of the *Corn Products* doctrine, but only the precise evidentiary standard to be applied in assessing the taxpayer's motive.

The lower courts, except for the Eighth Circuit, consistently have applied the basic premise of *Corn Products* — that it is the purpose for which an asset is acquired and held, and not the nature of the asset, that is determinative under § 1221.[20] All of these courts agree that, at a minimum, the taxpayer must show that the *dominant purpose* for *acquiring and retaining* the asset was a business purpose. *See, e.g., Booth Newspapers, Inc. v. United States*, 303 F.2d 916 (Ct. Cl. 1962). While some courts have gone further to require that the taxpayer also prove the absence of a substantial investment purpose for the acquisition and retention of an asset, *see, e.g., W. W. Windle Co. v. Commissioner*, 65 T.C. 694, 713 (1976), *appeal dismissed for lack of jurisdiction*, 550 F.2d 43 (lst Cir.),

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[19] The Commissioner also erroneously suggests that disarray exists because of the unprincipled expansion of *Corn Products* beyond its factual limitations. *See* Resp. Br. at 37. The *Corn Products* decision requires an evaluation of purpose. Factual determinations must therefore be made, and those determinations, not surprisingly, produce an "amalgam" of results, reflecting the variety of factual situations which trial courts face in implementing congressional policy under § 1221.

[20] *See* cases cited *supra* note 6.

cert. denied, 431 U.S. 966 (1977), none has ever expressed disagreement with the basic premise of *Corn Products*.

It is significant that, notwithstanding this limited debate regarding the precise evidentiary standard applicable (which can be definitively resolved by the Court's decision in this case), all of these lower courts necessarily would agree that the National Bank of Commerce (the "Bank") stock purchased by Arkansas Best after 1972 was an ordinary asset. The Tax Court found that Arkansas Best purchased and held the post-1972 stock "exclusively for business purposes," *Arkansas Best Corporation and Subsidiaries v. Commissioner*, 83 T.C. 640, 656 (1984), and that Arkansas Best "carried through on a losing proposition solely to preserve its business reputation," *id.* at 656-57.[21] These undisturbed factual findings would satisfy *any* standard adopted by the lower courts, and the

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[21] The Commissioner suggests that the quoted statements of the Tax Court conflict with its subsidiary finding that Arkansas Best purchased the Bank stock to preserve its equity in the Bank. *See* Resp. Br. at 11. The Commissioner confuses the issue by failing to read the Tax Court's subsidiary finding in context. First, the Tax Court clearly applied the "substantial investment standard" of *W. W. Windle Co.*, 65 T.C. at 710, so it necessarily concluded that any investment purpose which may have existed for the post-1972 purchases was not substantial. *See* 83 T.C. at 653. Second, the Tax Court found that Arkansas Best was "preserving its equity" only after finding that the condition of the Bank was critical, that the failure of Arkansas Best to participate in the capital calls would have resulted in the demise of the Bank, that Arkansas Best, as controlling shareholder of the Bank, had a special responsibility to the minority shareholders of the Bank, and that failure of the Bank would have damaged Arkansas Best's sources of financing and business reputation. Arkansas Best thus attempted to "preserve its equity," but only in the context of preventing the demise of the Bank, and thereby preventing possible litigation by minority shareholders and preserving Arkansas Best's business reputation. *See* 83 T.C. at 656.

debate among those courts as to "mixed motive" situations is irrelevant to the issues with respect to the post-1972 stock presented in this case.

D. The *Corn Products* Doctrine has Proved to be a Workable and Logical Implementation of Congressional Intent

Contrary to the suggestion of both the Eighth Circuit[22] and the Commissioner, *see* Resp. Br. at 36, the *Corn Products* doctrine has proved to be a workable and logical implementation of congressional intent, and does not allow taxpayers to "pick and choose" their tax consequences. While it is correct that asset acquisitions are sometimes driven by both business and investment reasons, *see* Resp. Br. at 40-41 & n.26, the Commissioner goes too far when he suggests that the *Corn Products* doctrine facilitates tax manipulation. This mischaracterization results from the Commissioner's understatement of the standard which the taxpayer must meet under *Corn Products*. As interpreted by the lower courts, the *Corn Products* doctrine requires the taxpayer to establish, at a minimum, that he *acquired and retained* the asset with a *dominant* business purpose if that asset is to be characterized as ordinary. No court has suggested, as the Commissioner now does, *see, e.g.*, Resp. Br. at 42, that any business connection, no matter how limited or attenuated, will suffice.[23]

Moreover, that the inquiry is one as to the taxpayer's purpose does not suggest that Congress could not have intended to sanction the *Corn Products* doctrine. Congress

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[22] *Arkansas Best Corporation and Subsidiaries v. Commissoner*, 800 F.2d 215, 221 (8th Cir. 1986)

[23] Contrary to the Commissioner's suggestion, taxpayers can, and do, lose cases involving asserted business losses under the *Corn Products* doctrine. *See* cases cited in Pet. Br. at 26.

has expressly provided subjective standards throughout the Internal Revenue Code.[24] Similarly, Congress has reenacted statutory provisions without material change despite subjective standards supplied by courts, where such standards were helpful in effectuating congressional intent.[25] Congress could choose to provide a bright-line standard under § 1221 to replace the *Corn Products* doctrine,[26] but it has chosen not to do so because of the difficulty of drafting a statute which can categorize an asset consistently with congressional intent in all factual situations. *See* Surrey, *Definitional Problems in Capital Gains Taxation*, 69 Harv. L. Rev. 985 (1956).

II. THE STOCK ACQUIRED BY ARKANSAS BEST AFTER IT FILED THE IRREVOCABLE NOTICE OF INTENT TO DIVEST IS PROPERLY TREATED AS AN ORDINARY ASSET

The Commissioner argues that, even if this Court reverses the decision of the Eighth Circuit, the stock purchased by Arkansas Best after 1972 does not qualify as an ordinary asset. *See* Resp. Br. at 46. This argument confuses the business of Arkansas Best with the businesses of its subsidiaries. Moreover, it ignores the Tax Court's undisturbed factual findings that Arkansas Best purchased and held the Bank stock "exclusively for business purposes," 83 T.C. at 656, and that Arkan-

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[24] *See, e.g.*, § 269 (acquisitions made to evade or avoid income tax); § 532 (accumulated earnings tax if earnings retained to avoid income tax). *See also* §§ 269A, 341, 357(b), 845, 877, 1221(1), 2107.

[25] *See* cases cited *supra* note 14.

[26] *See, e.g.*, § 2035 (moved to a flat three-year rule away from the subjective standard of whether a gift was given in contemplation of death).

sas Best "carried through on a losing proposition solely to preserve its business reputation," *id.* at 656-57.

The Commissioner contends that the post-1972 purchases of Bank stock were not "integral and necessary" acts in the conduct of Arkansas Best's existing business, claiming that the Bank was isolated from what the Commissioner viewed as Arkansas Best's businesses (trucking, furniture manufacturing, insurance, data processing and tire sales), that the Bank did not interact with Arkansas Best or its subsidiaries in a "synergistic" fashion, and that Arkansas Best did not provide management services to the Bank. *See* Resp. Br. at 46. In so arguing, the Commissioner improperly focuses upon the businesses of Arkansas Best's subsidiaries, rather than the business of Arkansas Best itself. The Tax Court found that Arkansas Best was in the business of acquiring and managing going concerns in diverse, yet complementary, lines of business. 83 T.C. at 653. The Tax Court further found that the post-1972 purchases were necessary to protect Arkansas Best from potential litigation and to preserve Arkansas Best's sources of financing and business reputation, factors critical to Arkansas Best's business as a holding company. It has long been settled that expenses incurred to protect business reputation are deductible as ordinary and necessary business expenses. *See Dunn & McCarthy, Inc. v. Commissioner*, 139 F.2d 242 (2d Cir. 1943). Assets acquired for the same business purpose likewise should be accorded ordinary asset treatment. *See Campbell Taggart, Inc. v. United States*, 744 F.2d 442 (5th Cir. 1984). Thus, even if the *Corn Products* doctrine did include an "integral and necessary" component, the post-1972 stock purchases would satisfy that test because they were necessary to protect Arkansas Best from possible litigation and to preserve its sources of financing and its reputa-

tion for skilled management. As such, the stock was an ordinary asset.[27]

Certain factual issues remain to be resolved, however, with regard to the Bank stock purchased by Arkansas Best between August 1, 1971 and January 1, 1973. As in the examples cited by the Service in Rev. Rul. 58-40, 1958-1 C.B. 275, Arkansas Best intended to sell the stock it purchased in 1972 before it even acquired it, and did not retain the stock longer than necessary. *See also Campbell Taggart, Inc.*, 744 F.2d 442. The Tax Court clearly erred when it distinguished the pre-1973 stock purchases from the stock purchased by Arkansas Best after 1972.[28] The Eighth Circuit denied Arkansas Best's challenge to this factual finding, not because the evidence supported the Tax Court's finding, but because the Eighth Circuit erroneously believed that stock could never be an ordinary asset under any circumstances.[29] Consequently, Arkansas Best's contention that the Tax Court's factual finding was clearly erroneous effectively has not been reviewed.

Given the Tax Court's largely uncontested findings of fact, it is only the stock that was purchased between August 1, 1971 and January 1, 1973 that can be considered subject to

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[27] Similarly, the stock purchased by Arkansas Best from its subsidiary, Universal Insurance Company, was purchased for dominant business reasons. The Commissioner concedes that the assumption underlying the Tax Court's decision with regard to this stock was erroneous. *See* Resp. Br. at 9 n.5. Thus, there is no factual dispute about this stock, and it also should be accorded ordinary asset treatment.

[28] It should be noted that the Tax Court did not have the benefit of the analysis of the Fifth Circuit Court of Appeals in *Campbell Taggart, Inc.*, 744 F.2d 442, when it rendered its decision in this case.

[29] 800 F.2d at 221.

the "mixed motive" controversy which has existed in the lower courts. Arkansas Best asks this Court to apply the dominant motivation test previously applied by this Court in the context of §§ 165 and 166. *See, e.g., United States v. Generes*, 405 U.S. 93, 103 (1972).[30]

CONCLUSION

In light of the Eighth Circuit's erroneous rejection of the *Corn Products* doctrine, its decision should be reversed and rendered as to the post-1972 stock, and reversed and remanded as to the stock acquired during the period of late 1971 through 1972.

Respectfully submitted,

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[30] The Commissioner errs when he argues that the *Generes* standard may not be applied in this case because the business/non-business distinction is of no import under § 1221. That the business/non-business distinction is explicit in § 166, but implicit in § 1221, does not suggest that different standards should apply.